

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN,)	No. C 07-475 MJP
)	
Plaintiffs,)	DECLARATION OF
v.)	NICHOLAS J. PSYHOGEOS IN
)	SUPPORT OF MICROSOFT'S
MICROSOFT CORPORATION, a Washington)	RESPONSE TO PLAINTIFFS'
corporation,)	MOTION TO SEAL CERTAIN
)	CONFIDENTIAL DOCUMENTS
Defendant.)	MAKING THE SHOWING
)	REQUIRED BY CR 5(g)

I, NICHOLAS PSYHOGEOS, hereby declare as follows:

1. I am employed by Microsoft Corporation ("Microsoft") at our headquarters in Redmond, Washington. I have been employed by Microsoft since 1998. My current position at Microsoft is General Manager of the Worldwide OEM Programs & Policy team. I have held that position since April 2005. I am over 18 years of age. I have personal knowledge of the facts set forth herein, except as to those facts where I state that my understanding is based on information available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy team.

2. In my position as General Manager of the Worldwide OEM Programs & Policy team, I am responsible for managing Microsoft's programs, licensing and policies with the companies (called "original equipment manufacturers" or "OEMs") that manufacture

DECLARATION OF NICHOLAS J. PSYHOGEOS IN SUPPORT OF
RESPONSE TO MOTION TO SEAL (C 07-475 MJP) — 1

DWT 2155907v1 0025936-000689

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 • 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150 • Fax: (206) 757-7700

1 computers that have Microsoft operating systems and other software preinstalled on them
2 under one or more licenses from Microsoft or an affiliate.

3 3. I understand that the plaintiffs in this lawsuit have submitted copies of the
4 following confidential agreements, communications and other materials with Plaintiffs'
5 Motion for Class Certification and their Motion for the Application of Washington Law
6 (hereafter "Plaintiffs' Motions"):

- 7 • Microsoft's Business Terms Document for OEM
8 Customers (Version 9.0), Bates stamped as MS-KELL
000000000207-219.
- 9 • Microsoft's Designed for Microsoft Windows and
10 Windows Vista Logo License Agreement with OEMs
11 (Version 9.3), Bates stamped as MS-KELL 5000044-
5000059.
- 12 • Microsoft's OEM Marketing Bulletin, dated
13 September 20, 2006, concerning the "Windows Vista
Capable" program, Bates stamped as MS-KELL
000000000039-58.

14 4. Each of these materials is, or contains information about, a commercially
15 sensitive business matter, and each of them is of significant competitive value to Microsoft.
16 As such, Microsoft considers these materials confidential and takes steps to keep these
17 materials confidential. Each of the three business documents listed above is labeled
18 "Confidential" on each page of the document. The "Confidential" labels on these documents
19 were included or placed on or within them prior to the inception of this lawsuit, and are
20 separate from any "confidential" designation that may have been placed on them in
21 connection with this litigation.

22 5. Maintaining the confidentiality of the agreements and communications with
23 our OEM partners listed in paragraph 3 above is not simply a matter of great importance to
24 Microsoft. The OEMs also have contractual rights to confidentiality under these agreements,
25 and, based on information available to me as General Manager of Microsoft's Worldwide
26 OEM Programs & Policy team, I understand that OEMs expect Microsoft to keep these
27 matters confidential.

Microsoft's Business Terms Document for OEM Customers

6. One of the confidential documents is Microsoft's Business Terms Document for OEM Customers (hereafter, "BTD"). [Dkt. 63.] The BTD contains the business terms that are incorporated into Microsoft's licensing agreements with OEMs for specific software products, including, but not limited to, Microsoft's Desktop Operating System License Agreement for OEM Customers (the "DTOS Agreement").

7. The DTOS Agreement is the license agreement that Microsoft enters into with an OEM that authorizes the OEM to preinstall specified Microsoft operating system software on the PCs the OEM manufactures and sells. Although Microsoft licenses such operating system software under uniform terms and conditions to all OEMs (pursuant to the consent decree with the U.S. Department of Justice) Microsoft does not divulge these terms, which are set forth in the DTOS Agreement and the BTD, to its software competitors or to the public.

8. The DTOS Agreement incorporates by reference all of the terms of the BTD. *See* DTOS Agreement, excerpts of which are attached as Exhibit F to the Supplemental Declaration of Mark Wilner in Support of Plaintiffs' Reply in Support of their Motion to Compel Discovery and to Deem Certain requests for Admission "Admitted" [Dkt. 48], at Terms and Conditions ¶ 1.

9. The BTD includes such information as: (a) specific instructions for OEM to make payments to Microsoft, including wiring instructions and Microsoft bank account numbers; (b) contractual limitations on the licenses granted by Microsoft to OEMs; (c) certain reporting requirements for OEM licensees; (d) warranty information; (e) confidentiality agreements; (f) terms relating to the termination of the agreement; and (g) other general business terms for OEM customers. *See* BTD, attached as Exhibit D to the Declaration of William C. Smart [Dkt. 63].

10. Microsoft considers both the DTOS Agreement and the BTD incorporated into the terms of the DTOS Agreement to be commercially sensitive business matters and takes

1 steps to keep these materials confidential, as set forth in greater detail in paragraphs 21, 22
2 and 23 below.

3 11. I previously signed a Declaration in Support of Microsoft's Motion to Seal
4 Confidential Documents dated October 1, 2007 (my "Prior Declaration") [Dkt. 54]. One of
5 the purposes of my Prior Declaration was to provide evidentiary support for Microsoft's
6 request that certain excerpts from the DTOS Agreement, which counsel for Plaintiffs had
7 submitted to the Court under seal in support of Plaintiffs' Motion to Compel, remain sealed
8 and kept confidential by the Court. [Dkt. 54, ¶¶ 3, 9, 10]; [Dkt. 48 (Attachment F)]. My
9 testimony relating to the DTOS applies to the BTD as well.

10 **Microsoft's Designed for Microsoft Windows and Windows Vista**
11 **Logo License Agreement with OEMs**

12 12. Another of the confidential documents is Microsoft's Designed for Microsoft
13 Windows and Windows Vista Logo License Agreement with OEMs (hereafter, the "Logo
14 License Agreement"). [Dkt. 62.]

15 13. The Logo License Agreement is a contract under which Microsoft specifies
16 criteria under which OEMs may use particular Microsoft-created logos on or in connection
17 with the PCs the OEMs manufacture and sell with Microsoft software.

18 14. Microsoft does not divulge the terms of the Logo License Agreement to its
19 software competitors or to the public. Microsoft considers the Logo License Agreement to be
20 a commercially sensitive business matter and takes steps to keep these materials confidential,
21 as set forth in greater detail in paragraphs 22, 22 and 23 below.

22 15. One of the purposes of my Prior Declaration was to provide evidentiary
23 support for Microsoft's request that certain excerpts from the Rule 30(b)(6) deposition
24 transcript of Ms. Christine Mullaney Sundlie in this case in which counsel for plaintiffs
25 questioned Ms. Mullaney Sundlie about the terms of the Logo License Agreement, which
26 counsel for Plaintiffs had submitted to the Court under seal in support of Plaintiffs' Motion to
27

1 Compel, remain sealed and kept confidential by the Court. [Dkt. 54, ¶¶ 3, 9, 11]; [Dkt. 48
2 (Attachment A)].

3 16. It is my understanding that, as part of Plaintiffs' Motions, Plaintiffs have now
4 submitted to the Court a copy of the Logo Licensing Agreement in its entirety. *See* Exhibit C
5 to the Declaration of William C. Smart [Dkt. 62].

6 The OEM Marketing Bulletin

7 17. The last of the confidential documents is Microsoft's OEM Marketing Bulletin,
8 dated September 20, 2006, concerning the "Windows Vista Capable" program (the "OEM
9 Marketing Bulletin"). *See* Exhibit F to the Declaration of William C. Smart [Dkt. 64];
10 Exhibit A to Declaration of Jeffrey I. Tilden [Dkt. 67].

11 18. The OEM Marketing Bulletin is a document that Microsoft created to explain,
12 in detail, to its OEM partners the marketing strategy behind its "Windows Vista Capable
13 Program" and the specific steps and guidelines Microsoft had developed to implement that
14 program. This document was made available only to the OEM partners who were eligible to
15 participate in the "Windows Vista Capable" program, and was provided to those OEMs under
16 a non-disclosure agreement. A footer on each page of the OEM Marketing Bulletin states:
17 "Microsoft – OEM Confidential – Subject to NDA." Microsoft does not disclose this and
18 other documents detailing its marketing strategies to its software competitors or to the public.
19 Microsoft considers the OEM Marketing Bulletin to be a commercially sensitive business
20 matter and takes steps to keep these materials confidential, as set forth in greater detail in
21 paragraphs 21, 22 and 23 below.

22 19. One of the purposes of my Prior Declaration was to provide evidentiary
23 support for Microsoft's request that certain excerpts from the OEM Marketing Bulletin, which
24 counsel for Plaintiffs had submitted to the Court under seal in support of Plaintiffs' Motion to
25 Compel, remain sealed and kept confidential by the Court. [Dkt. 54, ¶¶ 3, 12]; [Dkt. 48
26 (Attachment B)].
27

1 20. It is my understanding that, as part of Plaintiffs' Motions, Plaintiffs have now
2 submitted to the Court a copy of the OEM Marketing Bulletin in its entirety. *See* Exhibit F to
3 the Declaration of William C. Smart [Dkt. 64]; Exhibit A to Declaration of Jeffrey I. Tilden
4 [Dkt. 67].

5 **Microsoft's Efforts to Maintain the**
6 **Confidentiality of Its Commercially Sensitive Business Documents**

7 21. It is Microsoft's regular practice to protect certain types of information as
8 confidential. I am familiar with how Microsoft stores and manages access to certain records
9 relating to our relationships with OEMs. In particular, I am personally familiar with how
10 Microsoft stores and manages access to records relating to (a) the various types of contracts
11 we enter into with OEMs and (b) the communications we have with OEMs concerning those
12 contracts, and, based on information available to me as General Manager of Microsoft's
13 Worldwide OEM Programs & Policy team, I understand how Microsoft stores and manages
14 access to records relating to (c) the marketing programs and strategies we develop for our
15 OEM partners to consider and use. Microsoft considers this information confidential,
16 proprietary and trade secret information of significant competitive value and exerts
17 commercially reasonable efforts to preserve the confidential, proprietary and trade secret
18 nature of such information.

19 22. We exert commercially reasonable efforts to ensure that the terms of our
20 agreements with our OEM partners (including those terms that are required to be uniform) are
21 not divulged outside the relationships with our OEM partners. In addition, we exert
22 commercially reasonable efforts to ensure that information concerning the details of each
23 particular OEM's transactions with Microsoft are not divulged to other OEMs or to the public.
24 This information is maintained in areas not open to the public in locations protected by
25 passwords (for online information) or locked cabinets and/or doors accessible only with
26 company-issued keys held by those with responsibility for protecting this information.
27 Furthermore, this information is available only to Microsoft personnel with a business need

1 for the information and to the particular OEM to which the information pertains. Divulging
2 this information in a public forum would create a serious and imminent threat of Microsoft's
3 competitors misusing and gaining unfair advantage from our confidential information, and it
4 would also harm our interests during future negotiations with OEMs.

5 23. In addition, we exert commercially reasonable steps to keep the details of
6 specific marketing strategies that Microsoft develops for its OEM partners to consider and use
7 in promoting the PCs they manufacture and sell that contain Microsoft software confidential
8 and available only to our OEM partners. We do not want our software competitors to have
9 access to these marketing strategies because we have made a significant investment of time
10 and resources in developing the strategies and we do not want our competitors to take
11 advantage of our efforts. Based on information available to me as General Manager of
12 Microsoft's Worldwide OEM Programs & Policy team, I understand that this information is
13 likewise kept confidential and is available only to Microsoft personnel with a business need
14 for the information and to the particular OEMs who are eligible to participate in the marketing
15 program to which the information pertains. Divulging this information in a public forum
16 would create a serious and imminent threat of Microsoft's competitors misusing and gaining
17 unfair advantage from our confidential information.

18 **Disclosure of Microsoft's Confidential Business**
19 **Materials Would Cause Significant Harm to Microsoft's Competitive Interests**

20 24. The public disclosure of the terms of any of Microsoft's agreements with
21 OEMs would put Microsoft at a competitive disadvantage vis-à-vis its software competitors.
22 If those competitors knew the terms to which we were willing to agree with an OEM partner,
23 Microsoft's competitors could use that information in their own negotiations with OEMs. For
24 example, a competitor knowing the terms to which Microsoft was willing to agree with an
25 OEM partner could provide more favorable terms to that OEM or to other of our current or
26 potential OEM partners. In that case, Microsoft could see its business with one or more
27

1 OEMs decline, and it could be forced to renegotiate its agreements with one or more OEMs
2 on less favorable terms—all to Microsoft’s competitive disadvantage in the marketplace.

3 25. In addition, the public disclosure of the details of marketing strategies that
4 Microsoft has developed for use by its OEM partners—such as the marketing strategies set
5 out in the OEM Marketing Bulletin for the “Windows Vista Capable” program—would also
6 put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those
7 software competitors knew the details of marketing strategies that Microsoft had developed
8 for use by its OEM partners, Microsoft’s competitors could use that information in their own
9 marketing programs or could structure their own marketing programs to undercut the
10 effectiveness of the strategies Microsoft had developed—all to Microsoft’s competitive
11 disadvantage in the marketplace.

12 26. Microsoft uses the BTM to provide business terms for its most important
13 software licenses with OEMs, including licenses for software that is not at issue in this
14 litigation, such as Microsoft Office and Microsoft’s server operating system software. As a
15 result, the BTM contains the majority of Microsoft’s business terms for licensing software to
16 OEMs, and any public disclosure of the BTM would reveal a large amount of highly
17 confidential information about how Microsoft conducts its licensing business with its OEM
18 partners. Dkt. 63. In addition, the BTM contains Microsoft’s confidential banking
19 information, including the details of Microsoft’s banking relationships, including Microsoft’s
20 specific bank account numbers. *Id.* at MS-KELL 000000000208. Disclosing this information
21 to the public would jeopardize the security of Microsoft’s bank accounts.

22 27. In my Prior Declaration, I provided evidentiary support for Microsoft’s request
23 that excerpts from Ms. Mullaney Sundlie’s testimony about the terms of the Logo License
24 Agreement be protected from public disclosure. [Dkt. 54, ¶¶ 3, 9, 11]. It is even more vital to
25 Microsoft that the actual terms of the Logo Agreement itself, in its entirety, be protected from
26 public disclosure.
27

28. Likewise, in my Prior Declaration, I provided evidentiary support for Microsoft's request that excerpts from the OEM Marketing Bulletin be protected from public disclosure. [Dkt. 54, ¶¶ 3, 12]. It is even more vital to Microsoft that the copies of the entire OEM Marketing Bulletin that Plaintiffs have submitted to the Court under seal with regard to Plaintiffs' Motions [Dkt. 64, 67] be protected from public disclosure.

**The Completion of the Windows Vista Capable Marketing Program
Has No Impact on the Confidentiality of the Logo License Agreement,
the BTM, or the OEM Marketing Bulletin**

29. Although the Windows Vista Capable marketing program contemplated by the OEM Marketing Bulletin and authorized by sections of the Logo License Agreement is now complete, those documents retain their commercial sensitivity. The Logo License Agreement and the OEM Marketing Bulletin contain the details of Microsoft's business and marketing methods and strategies with respect to OEMs. The public disclosure of those terms, even after the conclusion of the Windows Vista Capable marketing program, would put Microsoft at a competitive disadvantage vis-à-vis its competitors. If Microsoft's competitors knew the details of marketing strategies that Microsoft had developed for use by its OEM partners, those competitors could use that information in the development of their strategies to compete with Microsoft.

30. Similarly, the fact that individual versions of the DTOS Agreement and the BTM contain an Expiration Date and an End Date, respectively, does not mean that those documents no longer contain commercially sensitive information for Microsoft and the OEMs. Both the DTOS Agreement and the BTM contain the terms of Microsoft's agreements with its OEMs. The public disclosure of the terms of any of Microsoft's agreements with OEMs would put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those competitors knew the terms to which Microsoft was willing to agree with an OEM partner, Microsoft's competitors could use that information in their own negotiations with OEMs. For example, a competitor knowing the terms to which Microsoft was willing to agree with an OEM partner could provide more favorable terms to that OEM or to other of

1 our current or potential OEM partners. In that case, Microsoft could see its business with one
2 or more OEMs decline, and it could be forced to renegotiate its agreements with one or more
3 OEMs on less favorable terms—all to Microsoft's competitive disadvantage in the
4 marketplace. This risk is particularly great where, as is the case here, the agreements are so
5 recent. The End Date for the version of the BTM at issue, version 9.0, is July 31, 2007. The
6 Expiration Date for the version of the DTOS Agreement at issue, version 8.01, is July 31,
7 2006. The Logo License Agreement, version 9.3, was released in 2006.

8 31. The BTM, the DTOS Agreement, and the Logo License Agreement are all
9 agreements that Microsoft uses over the long term of its desktop operating system business,
10 one of Microsoft's largest sources of revenue. Because of the importance of the desktop
11 operating system business to Microsoft, Microsoft considers these agreements to be highly
12 confidential. All three agreements have been used continuously, and evolved through several
13 versions over many years. Although the terms of these agreements change to some degree
14 when they are revised—usually each year—the basic framework they provide for Microsoft's
15 business dealings with its OEM partners usually remains quite similar from one year to the
16 next. Thus, Microsoft's competitors would still be able to utilize the information contained in
17 the versions of the BTM, the DTOS Agreement, and the Logo License Agreement at issue
18 here to Microsoft's competitive disadvantage in the marketplace were they disclosed.
19 Disclosing them would cause Microsoft serious harm, as I described above.

20 32. Similarly, the OEM Marketing Bulletin reveals a marketing strategy that
21 Microsoft used in the release of its last two desktop operating systems—Windows XP and
22 Windows Vista—and Microsoft may well use the OEM Marketing Bulletin again to provide a
23 framework for a similar marketing program in the future. As a result, Microsoft would still
24 suffer a competitive disadvantage in the marketplace if one of its competitors obtained access
25 to a copy of the OEM Marketing Bulletin, regardless of the fact that the Windows Vista
26 Capable marketing program is now complete.

